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**Title:** 'The end of innocence: Open justice, free speech and privacy in the modern constitution – *Khuja (formerly PNM) v Times Newspapers Limited*'

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**Abstract:** This case note explores the issue of open justice considered by *Khuja (formerly PNM) v Times Newspapers Limited* in the Supreme Court and argues that the current law is confused and incoherent. Far from settling the debate, it is suggested that the decision further undermines some of the key assumptions underpinning the current approach, especially in the light of the compelling and humane minority judgment. This leaves the area ripe for reconsideration in general terms. This note challenges many of the formulaic slogans and rhetoric in previous case law as well as suggesting that the meaning of open justice has been lost in current discourse. After summarising the facts, this note sets out the majority and minority judgments, before analysing some of the conceptual difficulties raised – particularly those of open justice, privacy, presumption of innocence and freedom of speech.

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## INTRODUCTION

The long running judicial and academic debate in the UK over the meaning of open justice has resulted in multiple appellate decisions in recent years. In *Khuja (formerly PNM) v Times Newspapers Limited* ('*Khuja*'), the tension between privacy and open justice was confronted once again, and in the starkest of terms.<sup>1</sup>

Mr Khuja sought an injunction to protect his anonymity after he was named by a police officer, counsel and a judge in open court in connection with an extremely high profile criminal case involving the sexual assault of minors in Oxford. Mr Khuja had been arrested in connection with the case but never charged or prosecuted. Nine other men were prosecuted and seven convicted. Mr Justice Tugendhat in the High Court, a unanimous Court of Appeal – including the Master of the Rolls – and a majority (5-2) of the Supreme Court all agreed that Mr Khuja could not prevent the publication of his name and the details of his arrest.

This case note explores the issue of open justice considered in the case and argues that the current law is confused and incoherent. Far from settling the debate, it is suggested that the decision further undermines some of the key assumptions underpinning the current approach, especially in light of the compelling and humane minority judgment. This leaves the area ripe for further reconsideration in the future. This note challenges some of the overblown rhetoric and empty slogans in previous case law on open justice. It also suggests that the meaning of this key concept has been obscured in current discourse. After summarising the facts, this note sets out the majority and minority judgments before analysing some of the conceptual difficulties raised – particularly those of open justice, privacy and freedom of speech.

## Background and facts

The harrowing and highly publicised trial of an Oxfordshire gang convicted of the long-term grooming, exploitation and rape of underage girls came to an end in the Old Bailey on 14 May 2013.<sup>2</sup> Considerable criticism was levelled at local authority procedures and practices, as well as social services and the police; some of that criticism was frankly acknowledged to be justified.<sup>3</sup> Mr Khuja was arrested during the initial investigation. At a preliminary hearing, a magistrate's order prevented Mr Khuja being named until and unless he was charged with an offence. On 25 July 2013, Mr Khuja was told that he was no longer under arrest and it was this development that caused the newspapers to seek the lifting of the anonymity order on 25 September 2013. Mr Khuja immediately applied to the High Court to prevent the publication of any aspect of his involvement in the legal proceedings. The High Court refused the injunction sought and allowed publication but the original order was continued pending the final determination of Mr Khuja's application in the Supreme Court.

During the Old Bailey trial, a complainant stated she had been repeatedly raped, over a six month period, by a mystery assailant whose first name she identified as 'Tariq'. As it happens, this is also the first name of Mr Khuja. The High Court judge in this application, Mr Justice Tugendhat, pointed out that this name is 'very common'.<sup>4</sup> After giving a very detailed description, the complainant not only did not pick out Mr Khuja at an identification parade, she positively stated that she did not think her assailant was one of the twelve men in the line-up that included Mr Khuja. This is a crucial point that will be considered further below.

## THE SUPREME COURT DECISION

Lord Sumption gave the lead judgment for the majority, which included Lord Neuberger PSC, Lady Hale DPSC, Lord Reed and Lord Clarke ('the majority'). Lords Kerr and Wilson gave a joint dissenting judgment ('the minority'). After setting out the facts, the majority mapped out the existing legal framework and applied it to the present case. The issue before the court concerned the freshly minted common law ground of 'misuse of private information'.<sup>5</sup> This tort was designed to give effect to the right to respect for private life under

<sup>1</sup> *Khuja (formerly PNM) v Times Newspapers Limited* [2017] UKSC 49.

<sup>2</sup> [http://www.oxfordtimes.co.uk/news/10418476.Bullfinch\\_trial\\_The\\_verdicts/](http://www.oxfordtimes.co.uk/news/10418476.Bullfinch_trial_The_verdicts/). All websites last accessed, 24 July 2018.

<sup>3</sup> [http://www.oxfordmail.co.uk/news/bullfinch/10418902.Bullfinch\\_Statement\\_from\\_Police\\_and\\_Crime\\_Commissioner\\_Anthony\\_Stansfeld/](http://www.oxfordmail.co.uk/news/bullfinch/10418902.Bullfinch_Statement_from_Police_and_Crime_Commissioner_Anthony_Stansfeld/).

<sup>4</sup> *Khuja (formerly PNM) v Times Newspapers Limited* [2013] EWHC 3177, [9].

<sup>5</sup> *ibid*, [11].

Article 8 of the European Convention on Human Rights ('ECHR'). The court had to decide whether anonymity was justified for Mr Khuja or whether the doctrine of open justice meant that Mr Khuja's name must be released.<sup>6</sup> The court could have also addressed the implications of data protection legislation but it did not in fact do so.<sup>7</sup> Disagreement between the majority and the minority centred on the effect of the principle established in *Guardian News* that the general public 'understand the difference between allegation and proof'.<sup>8</sup> If the public were generally to be treated as recognising the difference, the weight to be given to the right to privacy would diminish, because an allegation is arguably less damaging to the privacy (and indeed reputation) of the defendant than proof.<sup>9</sup> Conversely, as the minority held, if the public do *not* generally recognise the distinction, the effect on Mr Khuja's privacy rights would be so profound as to justify their indefinite protection, notwithstanding the issue of open justice.

## The legal framework

For the majority, the starting point for open justice was *Scott v Scott*.<sup>10</sup> In that case, Lord Atkinson famously observed that open justice is 'often ...painful [and] humiliating, or deterrent to parties and witnesses'.<sup>11</sup> Such consequences, however, were 'tolerated and endured' as 'the best means for winning ... public confidence and respect' for the legal system.<sup>12</sup> The majority claimed that these arguments have even more significance today due to an increased desire for 'public accountability of public officers and institutions'.<sup>13</sup>

Open justice 'has, however, never been absolute'.<sup>14</sup> There are a number of historic exceptions including lunacy, trade secrets, protecting the privacy of minors and averting physical risk to the parties involved, where open justice must give way to these and other pressing interests. Furthermore, where the substance of the case would be frustrated by publicity – such as in blackmail cases – or where the 'practically unqualified' rights under Article 2 or Article 3 of the ECHR are engaged, then suitable measures to protect the identities of the parties are taken.<sup>15</sup> In recent years, cases concerning issues of national security and, in certain circumstances, privacy under Article 8 ECHR 'have combined to broaden the scope of the exceptions to the open justice rule'.<sup>16</sup>

Open justice has two aspects according to the majority: first, the hearing should be in open court; second, 'fair and accurate reports of proceedings' can be made by the media.<sup>17</sup> The latter is the relevant aspect for this case. The majority said specifically that 'it has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice'.<sup>18</sup> This is because 'the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so'.<sup>19</sup> Preventing the reporting of material seen and heard in court would be 'direct press censorship'.<sup>20</sup>

Historically, restrictions on the reporting of criminal trials come from legislation, rather than the common law.<sup>21</sup> Those restrictions tend to focus on the administration of justice or the protection of children. 'Except in the case of under-18 defendants, in criminal proceedings there are no statutory restrictions on the reporting of material deployed in open court which may identify a person alleged to have committed offences'.<sup>22</sup> Even

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<sup>6</sup> The tort of 'misuse of private information' has its roots in *Campbell v MGN* [2004] UKHL 22. It might be noted that the House of Lords in *Campbell* also did not discuss Campbell's data protection claims: see n 7 below.

<sup>7</sup> There was no discussion in the judgment of the separate issues raised by data protection legislation such as the Data Protection Act 1998 ('DPA') which gives effect to Directive 95/46/EC and intersects somewhat with the right to privacy. Space precludes a consideration of the wider issues potentially raised if the Supreme Court had canvassed this area of law. However, it is fair to point out that the test for a claim under data protection legislation would stand or fall with the claims actually put forward by Mr Khuja and considered by the Supreme Court.

<sup>8</sup> *Khuja* n 1 above at [8]. In *Re Guardian News and Media Ltd* [2010] 2 AC 697, [66].

<sup>9</sup> '[T]he right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life'. *Axel Springer AG v Germany*, (Grand Chamber), 39954/08, [2012] ECHR 227, [83]-[84].

<sup>10</sup> *Scott v Scott* [1916] AC 417.

<sup>11</sup> *ibid*, 463.

<sup>12</sup> *ibid*, 463.

<sup>13</sup> *Khuja* n 1 above at [13].

<sup>14</sup> *ibid* at [14].

<sup>15</sup> *ibid* at [15]. *A v BBC* [2015] AC 588.

<sup>16</sup> *ibid* at [15].

<sup>17</sup> per Lord Diplock, *Att Gen v Leveller Magazine Ltd* [1979] AC 440, 449-50.

<sup>18</sup> *Khuja* n 1 above at [16].

<sup>19</sup> *ibid* at [16].

<sup>20</sup> *ibid* at [16].

<sup>21</sup> Except, perhaps, legal privilege between client and lawyer.

<sup>22</sup> *Khuja* n 1 above at [18].

statutory reporting restrictions on defendant teachers 'lapse at the commencement of proceedings'.<sup>23</sup> In addition, fair and accurate reporting is absolutely privileged. However limits can be set on reporting based on contempt law, defamation and rights under the ECHR, given domestic effect via common law. The right to privacy – developed from breach of confidence<sup>24</sup> – provides an alternative, and broader, method of protecting reputation beyond defamation.

The principal authority on open justice is *In re S*, in which anonymity was sought for the child of a woman indicted for the murder of the child's brother.<sup>25</sup> There was psychiatric evidence that persistent publicity would be 'significantly harmful' to the child but various factors led to disclosure of the child's identity including: open justice; the limited statutory exceptions; the indirect nature of the impact; and the difficulty in setting 'rational boundaries' to the principle if anonymity was granted. The test laid down in *Re S* is the 'ultimate balancing' test which weighs the right of the media to report under Article 10 against the right to privacy under Article 8 and considers issues of justification and proportionality.<sup>26</sup>

The majority in *Khuja* then considered a series of cases where disclosure was approved, illustrating the importance of open justice and the right of the media to report on cases. In the case of *In re Trinity Mirror*, the children of a man guilty of possession of child pornography were found not to be entitled to anonymity. The judge held that reporting trials was 'the embodiment of the principle of open justice in a free country' and such conduct simply added the perpetrator's children to the list of victims of the crime.<sup>27</sup> In the case of *In re BBC*, the DNA of a man accused of rape was excluded from evidence, leading to his acquittal, and the BBC wished to make a programme discussing the case in the context of the criminal justice system.<sup>28</sup> The right of the media to publish material about the system was found to outweigh the man's privacy rights even though the DNA information 'would inevitably tend to suggest that he was guilty'.<sup>29</sup>

In *Guardian News*, anonymity was refused for unconvicted claimants subjected to asset-freezing orders under counter-terrorism legislation. It was held the public interest in knowing their identities outweighed their right to privacy.<sup>30</sup> In *A v BBC*, a foreign criminal was due to be deported and claimed anonymity because of the risk of death or ill-treatment on his return home because of his offences.<sup>31</sup> Anonymity was granted because lifting the order would subvert the whole basis of the decision to deport because loss of anonymity would prevent his deportation from taking place due to the risks to the applicant on his return.

Finally, the possibility of allowing all aspects of a case to be reported, *except* the name, was considered. Lord Rodger in *Guardian News* was cited for the proposition that the name is generally included because reporting the name is likely to make stories more 'full-blooded' and therefore more interesting for readers.<sup>32</sup> Exceptions to this rule cited by the court were *A v BBC* for the reasons outlined already as well as *R (C) v Secretary of State for Justice*, where anonymity was granted because of the potential detrimental impact on a soon-to-be-released convicted man who had serious psychiatric issues.<sup>33</sup>

### Application to the present case

The media companies in the *Khuja* case had written to the judge claiming that their coverage would be purely factual and focused on the open justice issues raised by the case. The majority held that to be irrelevant, as discharge of the order would give the media the right to say whatever they wanted. Mr Justice Tugendhat's first instance judgment refusing the anonymity order was then summarised, the key points being:<sup>34</sup>

- 1) Some members of the public would equate the suspicion that Mr Khuja had committed the offences that had led to his arrest with his guilt; this could result in behaviour amounting to harassment.
- 2) There was no way for Mr Khuja to 'clear his name'.
- 3) The public in general understand the difference between suspicion and guilt.
- 4) Some knowledge of what was said at trial would anyway spread in his personal circle.

<sup>23</sup> *ibid* at [18]. s 141F of the Education Act 2002 (allegations of criminal offences by teachers against pupils).

<sup>24</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>25</sup> *In re S* [2005] 1 AC 593.

<sup>26</sup> *ibid* at [17].

<sup>27</sup> *In re Trinity Mirror (A intervening)* [2008] QB 770.

<sup>28</sup> *In re British Broadcasting Corporation. In re Attorney General's Reference (No 3 of 1999)* [2010] 1 AC 145.

<sup>29</sup> *Khuja* n 1 above at [26].

<sup>30</sup> *Guardian News*, n 8 above.

<sup>31</sup> *A v BBC* n 15 above.

<sup>32</sup> *Guardian News*, n 8 above [57]. *Khuja* n 1 above at [29].

<sup>33</sup> *R (C) v Secretary of State for Justice (Media Lawyer Association intervening)* [2016] 1 WLR 444.

<sup>34</sup> *Khuja* n 1 above at [32].

- 5) Prohibiting reporting could actually aggravate the situation by leading to gossip about the case being ill-informed or misleading
- 6) Reports would make an important contribution to public knowledge.
- 7) Witnesses could come forward, or significance could be given to them *not* coming forward.<sup>35</sup>
- 8) The case was not distinguishable from *Re S*.

The grounds of the appeal against Mr Justice Tugendhat's judgment were, first, that *A v BBC* had modified the correct legal approach and, secondly, the *Guardian News* approach of distinguishing suspicion and guilt was an unwarranted *legal* presumption. This means that rather than being a question of fact for which evidence would need to be supplied, the issue is treated as a *legal* fact that needs no evidence. The majority rejected both grounds of appeal. *A v BBC* was found to be decided in line with *Guardian News* and the suspicion/guilt dichotomy held not to be a legal presumption, 'let alone an irrebuttable one'.<sup>36</sup> Mr Justice Tugendhat was simply saying that while some would equate suspicion with guilt, most would not. The judge had therefore committed no error of law. The majority said they might have been 'less sanguine' about the 'reaction of the public' but that would make 'no difference' because of five key points:<sup>37</sup>

- 1) It was now too late to seek anonymity. Had there been an application for the original *trial* to be conducted without mentioning Mr Khuja, that might have 'had considerable force'.<sup>38</sup>
- 2) Many people, including family members, suffer due to public trials. The 'collateral impact... is part of the price to be paid for open justice and the freedom of the press to report... on judicial proceedings'.<sup>39</sup>
- 3) It would be 'incoherent ...to refuse an injunction... directly, while granting it to prevent the collateral impact on Khuja's family'.<sup>40</sup>
- 4) Pre-emptive injunctions are not impossible but sexual abuse cases in the courts and their investigation are 'matters of legitimate public interest'.<sup>41</sup>
- 5) Withholding just *identity* would be more difficult because Mr Khuja was not a party or witness. The court found that the public has the right to know about any 'significant public act of the state'. Moreover, giving the story a 'human face is a legitimate consideration'.<sup>42</sup>

The majority dismissed the appeal.

## THE MINORITY JUDGMENT

The minority judgment focused directly on the presumption stated in *Guardian News* – that the public understand the difference between suspicion and guilt. They said that Lord Rodger made this claim without authority. They noted that the Court of Appeal had correctly observed that this presumption was 'the basis on which the judge proceeded'.<sup>43</sup> They disagreed with the majority that the presumption was not a *legal* presumption, pointing out that the phrase 'the law proceeds on the basis' contradicted that position. Furthermore, if it was merely a question of fact, then evidence as to actual public attitudes would be expected from the parties, and none had been supplied.<sup>44</sup> The fact that evidence was deemed unnecessary demonstrated that there was a *legal* presumption. This had the effect of generating a presumption in favour of publicity because the effect of public suspicion would be less than the effect if the public believed the defendant was guilty.

The minority claimed that the presumption was inescapably legal in nature, but with 'no proper legal foundation'.<sup>45</sup> This was because the presumption conflated two very different propositions. The first is that most people have 'no difficulty accepting ...that *the law* does not regard [an unconvicted person] as guilty' but that is 'distinctly different from saying that most people do not *themselves* regard him as guilty'.<sup>46</sup> The judgment went on to emphasise that expert judicial and other opinion had been moving in recent years

<sup>35</sup> If no witnesses came forward, that could indicate that there were no witnesses who *could* come forward because Mr Khuja was innocent.

<sup>36</sup> *Khuja* n 1 above at [32].

<sup>37</sup> *ibid* at [34].

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

<sup>43</sup> *ibid* at [41].

<sup>44</sup> *ibid* at [46].

<sup>45</sup> *ibid* at [46].

<sup>46</sup> *ibid* at [47].

towards increased anonymity for suspects including the report by Lord Justice Leveson and the formal judicial response to the Law Commission, co-authored by Mr Justice Tugendhat.<sup>47</sup> The minority also quoted Sir Richard Henriques, a former High Court judge, who said in an independent review that 'statutory protection of anonymity pre-charge is essential in a fair system'.<sup>48</sup>

A recent case was also cited in which a teenage girl had been made a ward of court and four men were warned not to associate with her. The judge in that case held there was no public interest in naming the men.<sup>49</sup> In addition, a Canadian case was cited in which the 'protection of innocent people' and the avoidance of 'irreparable harm' justified replacing the names of accused with initials, as the full name was only a 'sliver of information'.<sup>50</sup> In another Canadian case, cited by the minority, it was held that the 'openness of trials and... the administration of justice was not diminished by withholding' the identity of a third party accused of being the real offender and who had previous similar convictions.<sup>51</sup> The justification was expressly stated by Newbury JA as being the desire to show that society 'takes seriously the proposition that a person in Mr X's position is presumed innocent until proven guilty'.<sup>52</sup> The Times newspaper was quoted by the minority as pointing out that for 'all the presumption of innocence, mud sticks'.<sup>53</sup>

Finally, the minority pointed out that the only mentions in open court of Mr Khuja were when he successfully applied for anonymity to be continued and 'thereafter mostly by reason of evidence indicative of his innocence'.<sup>54</sup> They further pointed out that there was a need

to recognise the risk to [Mr Khuja] that his identification would generate a widespread belief not only that he was guilty of crimes which understandably attract a great deal of public outrage but also that he had so far evaded punishment for them.<sup>55</sup>

They held that, in their view, 'the scales have descended heavily in favour of [Mr Khuja's] rights under Article 8'.<sup>56</sup> The minority would have allowed the appeal.

## ANALYSIS

It is suggested that Mr Khuja's innocence and his right to privacy that logically follows from that innocence must frame the discussion of this case. Privacy matters. The recent action brought by Sir Cliff Richard against the BBC has established that 'a suspect has a reasonable expectation of privacy in relation to a police investigation'.<sup>57</sup> The reasoning of Mr Justice Mann is compelling, particularly on the distinction between genuine public interest and what allegedly interests the public:

Knowing that Sir Cliff was under investigation might be of interest to the gossip-mongers, but it does not contribute materially to the genuine public interest in the existence of police investigations in this area. It was known that investigations were made and prosecutions brought. I do not think that knowledge of the identity of the subject of the investigation was a material legitimate addition to the stock of public knowledge for these purposes.<sup>58</sup>

It is also perhaps useful to note that a YouGov poll carried out shortly after the *Richard* decision found that 86% of people thought suspects should be anonymous while being investigated, 83% after arrest and over 60% thought anonymity should be maintained not just after charge, but until conviction.<sup>59</sup> This is consistent

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<sup>47</sup> <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/sen-judiciary-response-to-law-comm-on-contempt-court.pdf>.

<sup>48</sup> *ibid* at [51].

<sup>49</sup> *Rotherham Metropolitan Borough Council v M* [2016] EWHC 2660 (Fam).

<sup>50</sup> *Khuja* n 1 above at [54], citing *BG v The Queen in Right of the Province of British Columbia* (2004) BCCA 345 at [26].

<sup>51</sup> *ibid* at [55].

<sup>52</sup> *ibid* at [55].

<sup>53</sup> *ibid* at [52].

<sup>54</sup> *ibid* at [57].

<sup>55</sup> *ibid* at [58].

<sup>56</sup> *ibid* at [59].

<sup>57</sup> *Richard v BBC* [2018] EWHC 1837 (Ch) at [248]. The BBC has decided not to appeal. <https://www.bbc.com/news/uk-45183421>.

<sup>58</sup> *ibid* at [282].

<sup>59</sup> <https://inform.org/2018/07/24/yougov-poll-public-backs-courts-decision-in-cliff-richard-case-86-favour-investigation-anonymity/>. Of course, this evidence provides no normative basis for policy to be determined.

with previous polling data.<sup>60</sup> Perhaps the public are not that interested after all. The right to privacy of Mr Khuja is no less compelling than Sir Cliff's, given Mr Khuja was also not charged or prosecuted.

On the issue of Mr Khuja's innocence, the law of evidence is rightly chary of 'fleeting glimpse' identifications but this case is arguably at the opposite end of the spectrum.<sup>61</sup> The complainant in this case had multiple opportunities to see her assailant, described as 'Mr X'.<sup>62</sup> It is grim to focus on the details, but the fact that she stated that she had been raped 'on a number of occasions over a period of about six months' meant that she must have seen him walk and talk, and seen him dressed and undressed.<sup>63</sup> She must have known his gait, his build and his colouring. She must have seen at close quarters, repeatedly, his hairline, his chin, his nose and his eyes. These details, which she must have observed, are crucial because, importantly, she stated positively in an identity parade that none of the twelve men, including Mr Khuja, was her assailant.<sup>64</sup>

Whilst other factors are clearly implicated in the ability of a complainant to identify her assailant in a crime such as this, the facts set out above must make us face the strong likelihood that Mr Khuja was dealing with the dreadful scenario of being trapped by the legal system when he is completely, factually, innocent. In the eyes of the law, the absence of charge (never mind prosecution or conviction) means that he is also entirely legally innocent - which ought to mean something.

### **Sacrificing an innocent person's reputation**

Once Mr Khuja's innocence is properly acknowledged, the importance of Mr Khuja's right to privacy is brought sharply into focus. An objective observer of the legal system would regard it as a matter of serious and deep concern if an innocent man's livelihood and standing amongst his family, friends and community could be seriously and permanently harmed by the way in which the system operated. There would need to be extremely strong arguments of principle to justify such detriments.

The prospects for Mr Khuja following his identification look quite bleak. Business contacts may fade quietly away. He may have to deal with his children coming home in tears because of playground insults. Friends may drift off inexplicably, leaving him wondering why. His marriage may be put under serious strain. If he is at some point not married, who will then date him in the era of online search engines? In short, as a direct result of his identification in the press in connection with this case, Mr Khuja may face extraordinary and wholly unmerited social and relational hardship for the rest of his life, for something he did not do.

## **OPEN JUSTICE**

Set against the obvious and powerful reasons to grant anonymity laid out above is the concept of open justice. Unfortunately, the principle of open justice is poorly understood. This can be illustrated by considering a leading monograph on open justice by Jaconelli which describes the 'right to public trial' as 'incoherent'.<sup>65</sup> His claim is based on the conceptual problems caused by the lack of choice of the right holder as to whether the principle is followed. It also relates to the fact that a public trial will damage interests of the accused 'no less important to the accused than his interest in avoiding wrongful conviction'.<sup>66</sup> If a leading expert does not think that the current understanding of the meaning of the right to a public trial is coherent, perhaps it is time to reconsider the concept of open justice from first principles. This involves reconsidering whether it is really accurate to treat open justice as a right held by the public in some nebulous, ill-defined way, as appears to be believed both generally and by Jaconelli.<sup>67</sup>

Instead it is suggested that the principle of open justice should be understood as a liberal principle with deep roots in protecting the *individual* against the state and its collectivist power. Arguably, the concept can even be used to explain the famous pronouncement in Magna Carta: 'No free man shall be ...imprisoned... except by the lawful judgment of his equals or by the law of the land'.<sup>68</sup> It is further arguable that open justice made

<sup>60</sup> <https://www.independent.co.uk/news/uk/crime/exclusive-three-in-four-believe-those-accused-of-sexual-assaults-should-be-granted-anonymity-8599788.html>. Poll research undertaken in May 2013.

<sup>61</sup> *R v Turnbull* [1977] QB 224.

<sup>62</sup> *Khuja* n 1 above at [7].

<sup>63</sup> *ibid*.

<sup>64</sup> *ibid* at [3].

<sup>65</sup> J. Jaconelli, *Open Justice* (Oxford University Press, 2002), 116.

<sup>66</sup> *ibid*, 116.

<sup>67</sup> Jaconelli highlights various rationales for open justice which are widely believed including 'the purely educative effect of the open conduct of trials'. Educative of the *public* that is, *ibid*, 39.

<sup>68</sup> Since the King would obviously be the sole decision-maker in his own court, the 'lawful judgment of his equals', it is suggested, refers only to the *presence* of the peers of the defendant - to ensure fairness and perhaps bind them into the



considerably more sense in the era before there were defence barristers, where blatant unfairness from the bench could possibly have been assuaged by a sympathetic audience for the defendant in the gallery. These are arguably the real roots of open justice as a concept. Since the institution, relatively recently, of the right to full legal representation in criminal trials, these original justificatory underpinnings of open justice could be thought to have somewhat abated.<sup>69</sup>

Open justice is not an aspect of free speech, contrary to what many assume. The British drafters of the ECHR, for example, appeared to be fully aware of this point because open justice is not protected by Article 10, which protects free speech, but by Article 6, which protects a citizen's right to 'a fair and *public* hearing'.<sup>70</sup> It is a right, then, *possessed by defendants*, not the public. It obliges the court to open the doors to the public, if the *defendant* wishes, in order to provide some protection from the oppressive or inappropriate exercise of power by state officials due to the presence of the defendant's friends and peers. Lepofsky construes a US case, *Gannet Co. Inc v DePasquale*, which concerns 'access rights' (in effect, open justice) as holding that society gives a guarantee,

primarily based on the Sixth Amendment 'public trial' guarantee... [and] that this guarantee is personal to the accused, assertable only by him, and intended only for his benefit, though it incidentally benefits the public.<sup>71</sup>

The purpose of open justice is, then, to hold the *state* to account in its treatment of accused persons and other citizens.<sup>72</sup> It is the judge, the prosecution, police officers and, arguably, the jury who are held to account. The concept has nothing to do with individuals caught up in the process. However, a principle designed to *protect* defendants has strangely metastasized, somehow now seen as vesting in 'the public' in a way that misconceives the core meaning of the doctrine. Properly understood, therefore, open justice actually *strengthens* the argument for not naming Mr Khuja because the public as a whole do not need to know his name for the state's actions in court to be scrutinised.

There are other strong reasons why Mr Khuja's name should not have been released. As the minority correctly state, it is unsustainable to claim that ordinary people faithfully apply the legal standard of presumption of innocence in situations like this which they hear about in the press. If the full rights to a fair trial including presumption of innocence are essential before *punishing* someone, then it must follow that natural justice must require rights for innocent third parties that are less extensive, but on the same spectrum for analogous reasons.

The fact that Mr Khuja had no opportunity to defend himself by calling witnesses, cross examining the person who accused them, or giving evidence in his own defence ought to require anonymity for anyone not in the dock who is accused of crime by anyone in open court. In this case, the complainant did not know any personal details about her assailant other than that his first name was Tariq. The complainant did not give Mr Khuja's surname and positively denied that anyone in the line-up, including Mr Khuja, was her assailant.

The only people in the Old Bailey who mentioned Mr Khuja's surname were a police officer, counsel and the judge. These are all officers of the court. For them to name Mr Khuja, and for that to be a stated reason to publish his name, contradicts the very meaning and purpose of open justice which is to hold *public officials* to account in their treatment of defendants and innocent third parties. This means that the court officials who gave his *full* name not only possessed no direct, relevant evidence but would not even have been relevant witnesses in any putative, separate hearing on whether he should be named (which natural justice would seem to require).

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King's decision. Failing that, they could enjoy the spectacle, if the accused triggered his right to trial by combat ('vel per legem terrae' – 'or by the law/custom of the land' - meant the ancient right to claim trial by battle). The real meaning of the clause is arguably that the 'lawfulness' of the judgment was secured by being determined *in front of*, not *by*, his equals. This is open justice in prototypical form.

<sup>69</sup> The right for one's lawyer to address the jury was only instituted in 1836, for example. See Prisoners' Counsel Act 1836, although the right to have a lawyer examine and cross examine was secured in the previous century.

<sup>70</sup> Article 6(1): In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing.

<sup>71</sup> Lepofsky, *Open Justice* (Butterworths: Toronto 1985) 127 summarising *Gannet Co. Inc v DePasquale* 443 U.S. 368 (1978).

<sup>72</sup> See also on the purpose of trials more generally: Ho, H L. (2008) 'Book Review: Duff, Farmer, Marshall and Tadros, *The Trial on Trial* (vol. 3): Towards a Normative Theory of the Criminal Trial,' *International Commentary on Evidence*: Vol. 6: Iss. 1, Article 3, 4-5. For a fuller discussion, see A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017) Chapter 4.

It is bewildering, almost Kafkaesque, that the actions of some state officials could be used by other state officials as the sole grounds of justification in releasing the name of someone of whom there is no direct evidence of that person's involvement in the criminal activity with which the trial was concerned. To use the actions of public officials as justification for naming Mr Khuja is to *invert* the meaning and purpose of open justice and turn it into an empty slogan. It is difficult to understand how his surname was mentioned in open court without it being struck from the record and the judge warning those present not to repeat it. Mr Khuja's application for temporary anonymity pending potential charge should have been heard in camera.

The principle of open justice is designed to be deployed *against* those in power. It cannot therefore coherently be used to justify sacrificing the privacy rights of Mr Khuja, a citizen, in this way. It is illogical and conceptually incoherent for a right to be deployed against the interests and against the will of the putative right holder. The claim that open justice can sensibly underpin this decision merely demonstrates how little that principle is understood.

#### *Application to UK case law*

If this analysis of open justice is accepted, it follows that much of the domestic UK case law on open justice is seriously misguided. Only a few examples need to be mentioned to make the point. Perhaps the most egregious example is the idea expressed by Lord Rodger in *Guardian News* that open justice requires the defendant's name to be published because that allows newspapers to sell more copies.<sup>73</sup> Bohlander has heavily, and persuasively, criticised this argument.<sup>74</sup> However, the key point in this note remains simply that to adopt the belief that the promotion of open justice requires discussing the defendant or innocent third parties in the media is also to misunderstand the vertical nature of the concept and its proper deployment against the *state*.

It is interesting that the majority in *Khuja* specifically highlight the increasing desire for the public to see officials scrutinised and held to account before inexplicably eliding that justifiable and reasonable approach with the publication of the name of private individuals in a deeply vulnerable position, unconnected to the state, like Mr Khuja. It is also puzzling that the majority glossed over the distinction, drawn by Lady Hale in *R (C) v Secretary of State for Justice*, between the benefits of disseminating general information about the trial and the benefits of the dissemination of the *identity* of those 'involved in the hearing'. In that case, her Ladyship pointedly argued that the rationales for the two different categories of information were 'not quite the same'.<sup>75</sup> She also damned with faint praise Lord Rodger's 'what's in a name' speech, cited above, by pointing out that the rise of electronic media rather undermines the foundation of Lord Rodger's argument that it is desirable to try to bolster newspaper sales.<sup>76</sup> It is disappointing that the possibilities opened up by these wise observations appear to have faded in this judgment, where she was in the majority.

### **FREEDOM OF EXPRESSION**

The next issue to address is the claim that free speech requires the newspapers to be able to report Mr Khuja's name. This is distinct from open justice addressed in the previous section. Free speech constitutes one of the key canons of liberal ideology, but is not exclusive to it, of course. The focus of liberalism itself, originally espoused by JS Mill, is on the protection of the individual against powerful groups, particularly the state.<sup>77</sup> Individualism runs through the political philosophy of Kant, Hobbes, Locke, all the way to Nozick and beyond. Free speech is the inalienable right for *individuals* to exchange ideas, challenge authority and argue for unpopular causes.

The majority judgment turns this most basic axiom of individualistic liberalism on its head. An individual is here being sacrificed at the altar of unaccountable, all-powerful media corporations who have hollowed out the principle of free speech and poured their power into the vacuum left by empty dogma.<sup>78</sup>

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<sup>73</sup> 'A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive', per Lord Rodger, *Guardian News* n 8, [63].

<sup>74</sup> M. Bohlander, 'Open justice or open season? Should the media report the names of suspects and defendants?' (2010) *Journal of Criminal Law* 321.

<sup>75</sup> *R (C) v Secretary of State for Justice* [2016] UKSC 2 at [1].

<sup>76</sup> *ibid* at [19].

<sup>77</sup> Mill, 'On Liberty' (Penguin, 1985).

<sup>78</sup> There is case law suggesting that corporations have rights under Article 10 ECHR as well (e.g. *Sunday Times v UK* A/30 (1979-80) 2 EHRR 245. Whilst this is true, this should not be allowed to obscure the rather different issues raised by the impact of corporate power on individual rights in a liberal democracy.

Mill's defence of the 'Liberty of Thought and Discussion' was explicitly predicated on the power of free speech to mitigate the enfeebling of doctrines into mere slogans over time by ensuring they are challenged in discourse.<sup>79</sup> It is ironic that the concept of free speech is now itself becoming enfeebled in this way. Formal dissent from the principle of free speech itself is obviously virtually non-existent, but respect for the idea is in danger of becoming mere lip service. *Khuja* raises serious questions, therefore, about the modern meaning of overblown free speech rhetoric. Any system that inflicts this kind of serious damage on an innocent man bears the burden of clear justification. That burden is some distance from being discharged. How can free speech legitimately be used as a weapon by the powerful *against* an individual in a liberal society? Naming this man is not an example of free speech, it is a travesty of the principle of free speech. If one steps back for a moment and weighs up the debate objectively and dispassionately, how does revealing this man's *name* contribute to public discourse on paedophilia, if that is the purported justification for naming?

### *Freedom of the press*

The argument in this section has so far focused on freedom of expression in general. Some may argue that it is necessary to consider whether specifically freedom of the *press* could justify the press publishing his name. Even if every mention of the name was correctly struck from the court record under a properly understood application of the open justice principle, the press would still inevitably acquire the name by fair means or foul. As Barendt argued in his seminal work *Freedom of Speech*, there are a number of competing perspectives on the relationship between the individual right to free speech and press freedom.<sup>80</sup>

Phillipson argues that the least persuasive of these is the basic 'equivalence' model which regards press freedom as equivalent to individual freedom of speech.<sup>81</sup> He argues the basic model risks both 'under' and 'over' privileging their role. On the one hand, the press insist upon, and receive, special privileges on issues such as protecting their sources and priority access to sensitive court cases such as closed terrorism trials.<sup>82</sup> This is hard to square with the equivalence model. On the other hand, many of the underpinning rationales for individual freedom of expression such as promoting self-development, autonomy and self-actualisation make no sense when dealing with powerful corporate entities.<sup>83</sup> The equivalence model therefore fails twice. This is before even mentioning any 'right to reply' which is nonsensical on an individual basis but arguably fundamental when dealing with corporate media.

What Phillipson terms the 'variable geometry' model is preferable. On this view, all media speech claims are subject to 'rigorous assessment under the free speech rationales', in order to ensure the 'best possible expressive environment for the *audience*'.<sup>84</sup> Accordingly we should consider the application to *Khuja* of the other suggested justifications for free speech beyond self-actualisation, such as holding government to account, democratic deliberation and the discovery of truth, in a Millian sense.<sup>85</sup> The release of Mr Khuja's name obviously fails the 'holding to account' principle because he is a private citizen. This leaves only truth-discovery and democratic deliberation because media corporations do not need to 'self-actualise' in a way that makes sense with an individual.<sup>86</sup> The problem for the truth-discovery justification is that Mill's persuasive reasoning refers only to the suppression of *arguments* on the grounds of their falsity because history teaches us that such arguments could in fact be true or partially true.<sup>87</sup> This has no applicability to the *name* of an innocent third party in a criminal case because his name is not an argument.

<sup>79</sup> *ibid*, Chapter 2. 'Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience'

<sup>80</sup> E. Barendt, *Freedom of Speech* (Oxford University Press, 2005); see also F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

<sup>81</sup> G. Phillipson, 'Leveson, the Public Interest and Press Freedom', (2013) 5(2) *JML* 220-240. Phillipson acknowledges his indebtedness to Barendt's analysis (in chapter 12, *ibid*) of the 'equivalence', 'special privileges' and 'differentiated privileges' models (the latter two labels being Phillipson's).

<sup>82</sup> See for example the exemptions in s 32 Data Protection Act 1998.

<sup>83</sup> Phillipson, above n 81, 224.

<sup>84</sup> Phillipson, above n 81, 227.

<sup>85</sup> Mill, 'On Liberty' (Penguin, 1985).

<sup>86</sup> Phillipson, above n 81, 227.

<sup>87</sup> Mill above, n 85.

The democratic deliberation argument is the only remaining potential justification for naming Mr Khuja in the press. As Leveson points out, when analysed properly, press freedom is of instrumental rather than intrinsic value. This is particularly the case where it is justified primarily under the argument that it plays a vital part in stimulating democratic deliberation.<sup>88</sup> The argument is that releasing Mr Khuja's name helps to foster democratic debate around criminal justice by helping sell more newspapers thus keeping them commercially viable. There is considerable support in the case law for this argument but it is unpersuasive at many levels.<sup>89</sup> One preliminary problem is that the press commonly have their own agenda, particularly on issues such as regulation, which seriously undermines any claim that they are 'honest brokers' simply facilitating and, literally, mediating public discourse. As Leveson points out, in some ways the press are actually *damaging* for rational democratic discourse. One only has to point to the 'transparent untruth[s]' told about press regulation under the Royal Charter to make this point good.<sup>90</sup>

There is a serious problem for the argument that printing Mr Khuja's name is required in order to help sell newspapers, thus maintaining their commercial viability. To be persuasive, the press must be committed to the far narrower, but necessary, claim that it is the non-consensual privacy-destroying publication that tips the balance between profitability and bankruptcy. The difficulty with this argument is that no evidence has been provided for this unsubstantiated claim.

A further difficulty relates to the very real debate over the ethnicity of the convicted defendants in the Oxford grooming gang case. Many allege that police fears over accusations of racism hampered proper and timely investigations. Conversely, actual racists could arguably use the Oxford case as ammunition and, as much as we may disagree with them, their views cannot be suppressed. It could be argued that releasing Mr Khuja's name is necessary to aid that perhaps distasteful debate. Indeed, Lord Rodgers also claimed that giving the name makes stories more readable and therefore fosters debate over criminal justice.

There is an alternative solution. There has long been a tradition in the media that 'names have been changed to protect the innocent'. There is no reason why the press cannot substitute alternative common names from the same community, if they so desire, as well as details about their life in such a way as to make the story attractive, without giving away the identity of non-public figures. The key point is that where the general public has no knowledge of the person involved, naming them is, as Phillipson points out, 'value-less'.<sup>91</sup> Using a pseudonym would permit the debate to continue unhindered whilst protecting an innocent man and his family from enormous harm. The same approach would clearly not be appropriate for, say, a prominent politician or other official known to the public.

In summary, therefore, none of the purported rationales underpinning freedom of expression in fact justify naming Mr Khuja.

## CONCLUSION

Lord Justice Leveson and other judges, as well as much of the police service and the Government, now accept that even suspects should be anonymous until charged, never mind innocent third parties.<sup>92</sup> This is a start but does not go far enough. The legal system is supposed to act in a just and fair manner. Entirely

<sup>88</sup> Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (HC 780, 2012), Vol 1, 63. 'freedom of the press is largely understood as an instrumental good, to be valued, promoted and protected to the extent that it is ... thereby enabled to flourish commercially as a sector and to serve its important democratic functions'.

<sup>89</sup> See *Guardian News*, n 8, above and *Re S*, n 26, above.

<sup>90</sup> For details see: <https://inform.org/2016/12/20/implementing-leveson-how-the-national-newspaper-groups-use-the-local-press-as-human-shields-hugh-tomlinson-qc/> and <https://inform.org/2016/12/06/consultation-on-leveson-the-press-has-no-case-at-all-brian-cathcart/>, where Brian Cathcart said: 'every one of the press industry arguments presented by the government is either a transparent untruth, a mischievous half-truth, a contrived scare story or an outrageous piece of special pleading'.

<sup>91</sup> Phillipson above n 81, 238. 'Moreover, at least some of these stories would still bring exactly the same contributions to public discourse even if the individual was not identified, so that such identification is value-less in speech terms, while often causing profound trauma to the individual'. Phillipson goes on in a footnote to say that this 'can apply where the individual was previously unknown to the public'. (Footnote 81, at 238).

<sup>92</sup> Lord Justice Treacy and Lord Justice Tugendhat et al, 'Contempt of Court: A Judicial response to Law Commission Consultation Paper No 209', March 2013, 4-5. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/sen-judiciary-response-to-law-comm-on-contempt-court.pdf>. See also, Sir Richard Henriques, "An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence", at [1.67]. <http://news.met.police.uk/documents/report-independent-review-of-metropolitan-police-services-handling-of-non-recent-sexual-offence-investigations-61510>. The then Home Secretary said 'I believe that there should be a right to anonymity at arrest' in May 2013. [www.bbc.co.uk/news/uk-22548065](http://www.bbc.co.uk/news/uk-22548065).

innocent third parties who are not even charged - much less prosecuted or convicted - are entitled to expect better treatment than this. The current system fails to protect the rights of these innocent third parties. By sacrificing Mr Khuja's right to privacy, for nothing, the courts risk bringing the legal system itself into disrepute. Worse still, this unfair treatment is justified on the altar of supposedly liberal principles whose meaning has been hollowed out and inverted by media entities whose unaccountable power toxifies our political discourse.<sup>93</sup> It is time for a more nuanced, sophisticated and defensible conceptual framework to be constructed in dealing with the unintended and unjust side effects of adherence to principles whose core definitions have now ossified into dogma.

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<sup>93</sup> On 1 March 2018, the cancellation of Leveson II and proposals to repeal s 40 Crime and Courts Act 2013 were announced. This decision is a betrayal of serious promises made across the political spectrum to a large number of innocent victims of organised and repeated criminal offences. <http://www.bbc.co.uk/news/uk-politics-43240230>.